In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 194 Misc.

ROBERT HUBBARD AND LAVINIA HUBBARD, HIS WIFE, PETITIONERS

v.

HENRY L. BROOKS, UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF KENTUCKY

ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

STATEMENT

On April 26, 1955, the District Director of Internal Revenue at Louisville, Kentucky, notified Robert and Lavinia Hubbard (hereinafter called taxpayers) that an examination of their tax return for the year 1953 disclosed that an addition to tax, in the amount of $119.79, was due for failure to file a declaration of estimated tax on time or for failure to pay installments when due, pursuant to Section 294 (d) (1) (A) and (B) of the Internal Revenue Code of 1939 (26 U. S. C. 1952 ed., Sec. 294 (d)). (Pet. 58–62.) On

May 18, 1955, the District Director similarly notified taxpayers that the amount due for the addition to tax had been corrected to $231.57. (Pet. 63–67.) Thereafter, in compliance with Section 272 (a) and (c) of the Internal Revenue Code of 1939 (26 U. S. C. 1952 ed., Sec. 272 (a) and (c)), the District Director sent a statutory notice of deficiency by registered mail to the taxpayers.[1] The taxpayers did not file a petition in the Tax Court of the United States for a redetermination of the deficiency and, after the expiration of the ninety-day period provided by the statute, the addition to tax was assessed and collection proceedings were initiated, the taxpayers' bank account being attached. (Pet. 94.)

Taxpayers then filed a complaint in the United States District Court for the Western District of Kentucky, seeking an injunction restraining the collection of the amount assessed. (Pet. 69–72.) A motion to dismiss the complaint was filed, contending (1) that the complaint failed to state a claim upon which relief could be granted, and (2) that it appeared on the face of the complaint that the court lacked jurisdiction because the court was specifically

[1] It was stipulated (Pet. 57) that the exhibits attached to the stipulation filed in the District Court were the notices and correspondence between taxpayers and the District Director. Taxpayers printed the stipulation and certain of the exhibits in the appendix to their petition (Pet. 57–68). Copies of the remaining exhibits, including the statutory notices of deficiency, are submitted herewith. This stipulation, and the exhibits attached thereto, clearly support the District Court's finding (Pet. 94) that the District Director fully complied with the provisions of Section 272 (a) and (c) of the 1939 Code.

forbidden, by Section 7421 (a) of the Internal Revenue Code of 1954, to enjoin the administrative collection of federal taxes or additions to tax, and because the taxpayers had an adequate remedy at law. (Pet. 74–76, 84–85.) Taxpayers then filed a third amended complaint (Pet. 87–88),[2] which alleged that Section 294 (d) (1) (A) and (B) of the Internal Revenue Code of 1939 (which provides the statutory authority for the addition to tax involved herein) is contrary to the due process clause of the Fifth Amendment to the Constitution of the United States. Taxpayers further amended the third amended complaint (Pet. 90), asking that a three-judge court be convened to decide this issue. A similar motion to dismiss the third amended complaint was filed. (Pet. 92–93.)

The District Court, in an order entered July 3, 1957, sustained the motion to dismiss, holding that the taxpayers' contentions, if established, did not present any special and extraordinary circumstances which would justify equitable relief. The court also refused to convene a three-judge court, finding that no substantial federal question was presented. (Pet. 94–96). Taxpayers filed a motion to vacate and set aside and or alter or amend this order (Pet. 97–100). This motion was denied on July 22, 1957 (Pet. 102).

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[2] The original complaint (Pet. 69–72) had named the Commissioner, Regional Commissioner, and District Director of Internal Revenue as defendants. A first amended complaint (Pet. 78–79) was filed, amending certain allegations, and a second amended complaint (Pet. 81–82) was filed, voluntarily dismissing the action against the Commissioner and Regional Commissioner, and naming the United States as defendant.

On September 5, 1957, taxpayers, without first seeking review by the United States Court of Appeals for the Sixth Circuit, filed the instant motion for leave to file a petition for a writ of mandamus ordering the Honorable Henry L. Brooks, United States District Judge for the Western District of Kentucky, to revoke the orders of July 3, and July 22, 1957, and to convene a three-judge court to hear the constitutional question raised.

DISCUSSION

From the foregoing facts, it is clear that the order of the District Court refusing to convene a three-judge court and, in addition, dismissing the complaint, was correct and that taxpayers' motion for leave to file a petition for a writ of mandamus should be denied.

At the outset, it is submitted that the taxpayers' motion is premature. The remedy of a writ of mandamus directing the convening of a three-judge court is not available where there is a remedy by way of appeal. *Stratton v. St. Louis Southwestern Railway Co.*, 282 U. S. 10, 16. Where a district judge, as here, finds that no substantial constitutional issue is presented by the complaint and refuses to convene a three-judge court,[1] his decision is subject to review by

[1] It is the duty of a district judge, to whom application has been made for an injunction restraining the enforcement of a federal statute on the grounds of constitutional invalidity, to scrutinize the complaint to ascertain whether a substantial federal question is presented, as otherwise the provision for the convening of a court of three judges is not applicable. *California Water Service Co. v. Redding*, 304 U. S. 252, 254–255.

the appropriate Court of Appeals. *Wicks* v. *Southern Pacific Co.*, 231 F. 2d. 130 (C. A. 9th), certiorari denied, 351 U. S. 946.* Accordingly, the instant motion should be denied.

Moreover, it is apparent that no substantial federal question is presented and that the District Court was correct in so holding. An amount determined as a penalty under Section 294 (d) of the Internal Revenue Code of 1939 can, by itself, give rise to a deficiency as defined in Section 271 of the 1939 Code, and is properly assessed by the means provided in Section 272 of the 1939 Code. *Newsom* v. *Commissioner*, 22 T. C. 225, affirmed *per curiam*, 219 F. 2d 444 (C. A. 5th); *Davis* v. *Dudley*, 124 F. Supp. 426 (W. D. Pa.). Cf. *United States* v. *Erie Forge Co.*, 191 F. 2d 627 (C. A. 3d). Section 272 (a) and (c) of the Internal Revenue Code of 1939, with which the District Director fully complied in this case, clearly provides for adequate notice and hearing within the requirements of the due process clause of the Fifth Amendment, and is plainly valid. Cf. *Phillips* v. *Commissioner*, 283 U. S. 589, 597-600.

In addition, it might be noted that the initial and basic relief sought by the taxpayers (i. e., an injunc-

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*This Court will exercise its discretion to issue a writ directly to a federal district court where appeal to an intermediate court would otherwise be available only in exceptional cases, i. e., where a question of urgent and overriding public importance is involved or where the question is of such a nature that it is peculiarly appropriate that such action should be taken. *Ex Parte Peru*, 318 U. S. 578. It is clear from the face of the petition that this case presents no such question, and is not of such exceptional character as to call invocation of any extraordinary remedies.

tion restraining the collection of the properly assessed addition to tax) is prohibited by statute. The addition to tax provided by Section 294 (d) of the 1939 Code is remedial, not penal (Cf. *Helvering* v. *Mitchell,* 303 U. S. 391), and the collection thereof cannot be enjoined in the absence of special and extraordinary circumstances. See *Miller* v. *Standard Nut Margarine Co.,* 284 U. S. 498, 509–510; *McDowell* v. *Heiner,* 9 F. 2d 120 (W. D. Pa.), affirmed *per curiam,* 15 F. 2d 1015 (C. A. 3d), certiorari denied, 273 U. S. 759; *Kohlhamer* v. *Smietanka,* 239 Fed. 408 (N. D. Ill.). Such circumstances not being presented here, the District Court was without jurisdiction, and the complaint was properly dismissed on this ground.

CONCLUSION

It is submitted that the petition for a writ of mandamus, in addition to being prematurely brought in this Court, is, on its face, without merit, and the motion seeking leave to file the petition should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

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